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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 390

MICHAEL BONAGURO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EVSEROFF, NEWMAN & SONENSHINE
Attorneys for Petitioner
Office & P. O. Address
186 Joralemon Street
Brooklyn, New York 11201
ULster 5-1111

WILLIAM SONENSHINE
Member of the Bar of the
Supreme Court of the
United States
Of Counsel

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit as follows:

A.

Opinion Below

The United States Court of Appeals for the Second Circuit by judgment entered on June 15, 1970, unanimously affirmed a judgment in the United States District Court for the Eastern District of New York convicting petitioner and one John Dono of possession, sale and passing counterfeit money, in violation of Title 18, Section 472, United States

Code, and of conspiracy so to do, in violation of Title 18, Section 371, United States Code, after trial by jury before Honorable Joseph C. Zavatt, Chief Judge of said Court.

The opinion of the United States Court of Appeals for the Second Circuit is set forth in Appendix A hereof.

There were no other opinions written in connection with the case.

B.

The Grounds on Which the Jurisdiction of This Court Is Invoked

Jurisdiction of this Court is invoked under Title 28, Section 1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1 of the Rules of this Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on June 15, 1970, as aforesaid.

C.

The Questions Presented for Review

1. Was the evidence sufficient in law to warrant a verdict of guilty?

2. Was it prejudicial error to allow in evidence the sum of $1,978 in concededly legitimate currency as found in petitioner's wallet upon his arrest?

3. Was the Court's supplemental charge to the jury sufficient to overcome the jury's expressed inability to understand the distinction between conspiracy and aiding and abetting?

D.

Statutes Involved

(1) The statutes involved are Sections 371 and 472 of Title 18, United States Code.

Each of the foregoing is set forth in Appendix B of this petition.

E.

A Concise Statement of the Case and the Material Facts Pertaining to Consideration of the Questions Presented

(1) Statement of the Case

Appellant was indicted in the United States District Court for the Eastern District of New York under Indictment No. 68 CR 326. Also named as defendants were John Dono, Fred Dono and Frank Digiamo.

The indictment charged all defendants jointly with conspiracy to violate the counterfeit laws and with six substantive counts relating to the possession, sale and passing of counterfeit money, 18 United States Code 371, 472 and 2.

The trial was held before Hon. Joseph C. Zavatt, then Chief Judge of the United States District Court for the Eastern District of New York, and a jury. Immediately prior to trial, a pre-trial hearing was held with respect to the motion to suppress evidence by appellant Dono. That motion was denied and on March 24, 1969 the first trial was commenced. That trial ended in a mis-trial on March 25, 1969. Later that day, the second trial (which is the subject of this appeal) was re-commenced with the selection of

a new jury. That trial thereafter continued from day to day until April 9, 1969 at which time the jury returned a verdict of guilty against appellants Dono and Bonaguro and the then co-defendant Digiamo.

One of the original defendants, Fred Dono, was dismissed prior to commencement of the trial.

The defendant Digiamo took no appeal from the judgment of conviction, leaving Dono and Bonaguro as the only appellants herein.

The trial Court dismissed substantive counts number two, three and four.

The following counts were submitted to the jury:

Count One — Conspiracy

Count Five — Passing counterfeit money

Count Six — Attempting to sell counterfeit money

Count Seven — Possession of counterfeit money.

The counterfeit money involved was a package of Five Thousand ($5,000) Dollars in twenty dollar bills.

The jury convicted both appellants and the co-defendant Digiamo of all the counts thus submitted to them.

On the 23rd day of June, 1969, appellant Bonaguro was sentenced to a prison term of five (5) years by Judge Zavatt. Appellant Bonaguro was released on bail pending the determination of his appeal and is presently at liberty pursuant thereto.

As previously indicated, the conviction was affirmed on appeal to the United States Court of Appeals for the Second Circuit.

(2) Material Facts Pertinent to the Issue Presented

The facts pertinent to the issues are detailed in the Points set forth in the Argument, *infra*.

F.

Basis for Jurisdiction in the United States District Court

The jurisdiction of the United States District Court for the Eastern District of New York was invoked upon the ground that the crimes charged were violations of Federal law, to wit: 18 U.S.C. §472 and 18 U.S.C. §371, allegedly committed within the Eastern District of New York.

G.

Argument Amplifying the Reasons Relied on for the Allowance of the Writ

POINT ONE

The evidence adduced against appellant Bonaguro was insufficient as a matter of law to establish guilt beyond a reasonable doubt as to any of the counts upon which he was convicted.

Appellant Bonaguro was convicted of the four counts of the indictment submitted to the jury, namely:

Count 1: Conspiracy;

Count 5: Passing counterfeit money;

Count 6: Attempting to sell counterfeit money;

Count 7: Possession of counterfeit money.

The basic facts of the case, according to the prosecution's witnesses, revolve around the events of August 2, 1968. On that day at about noon time one Meliton Cubeiro (a witness for the prosecution) went to appellant John Dono's home in Staten Island and there received from Dono a package containing $5,000 in counterfeit money. (This money was the money received in evidence upon the trial to support the charges in the indictment of which Bonaguro was convicted.)

Cubeiro testified at the trial that he had been introduced to Dono previously by defendant Frank Digiamo* for the purpose of Cubeiro's negotiating to purchase counterfeit money from Dono.

Immediately after receiving the counterfeit money from Dono, Cubeiro left Dono's home and went to a nearby car where Government Secret Service Agents were awaiting him, as previously arranged amongst them and Cubeiro during the hour preceding their arrival.

Cubeiro showed the money to Agent D'Amelio. He in turn gave a signal to other agents who thereupon broke into Dono's house and placed Dono under arrest. Dono was then brought to the Secret Service offices in Manhattan.

Up to this point (Dono's arrest) none of the testimony or evidence refers to Bonaguro directly or indirectly. All of the evidence adduced as to Bonaguro relates to events which first took place after Dono's arrest.

More specifically, between 1:30 P.M., when Dono (in custody) arrived at the Secret Service office, and 2:30 P.M., Dono made a telephone call from those offices.

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* Digiamo was convicted upon the trial below along with Dono and Bonaguro. He did not appeal therefrom.

The telephone call was monitored and tape-recorded by Secret Service agents who testified that they did so with Dono's consent.

Agent Hurley testified that he listened in on the conversation over a nearby extension phone. A recording device was attached to Dono's instrument. A tape recording of that conversation was thereupon made.

The following is a transcript of that conversation. A pre-trial motion to suppress the conversation was denied. The transcript was received in evidence at the trial, again over objection, as Government's Exhibit 8. The transcript was read to the jury by Agent Hurley who stated, as he read from it, what was said by each party to the conversation. In reading the transcript, Hurley stated he could identify Dono's voice and Bonaguro's voice as being those of the two parties thereto.

The conversation as transcribed in Exhibit 8 and read to the jury by Agent Hurley:

"Q. Please tell the Jury which individuals said what.
A. The first hello is said by Bonaguro. The Mike is said by Bonaguro. The *yeah, who's this*, I believe that was said by Bonaguro. *John* is said by John. *Yeah, how are you John*, is said by Bonaguro.

What are you doing, is said by Bonaguro. *I am writing a letter* is said by Bonaguro. *You are writing a letter*, is said by Dono. *Yes* is said by Bonaguro.

Who are you writing to is said by Dono. *I am paying bills* is said by Bonaguro. *Paying bills* is said by Dono.

Yes is said by Bonaguro.

Did you give that to my brother last night is said by Dono. *Yeah* is said by Bonaguro.

Yeah, did he tell you that the guy wanted another five or what is said by Dono.

Yeah, I couldn't get in touch with him, I called him from the you know, station is said by Bonaguro. *Yeah,* is said by Dono and *he wasn't there though, you know, so I called this morning, I mean I forgot to call him this morning* was said by Bonaguro. *Yeah* is said by Dono.

So I didn't know. Well, he's supposed to call me at 3:30 is said by Bonaguro.

All right is said by Dono.

All right, John is said by Bonaguro.

Yeah is said by Dono.

Yeah, I'll be able to get him for you and bring him over to you tonight is said by Bonaguro.

Okay is said by Dono.

All right, John was said by Bonaguro.

So long, I believe it was said by Dono.

Oh, listen was said by Bonaguro.

Yeah, is said by Dono.

If he asks me about the—you didn't give him the money; did you? That was said by Bonaguro.

No, I didn't give him no money is said by Dono.

Yes, the guy is—he wanted another five, right is said by Bonaguro.

Yeah is said by Dono.

Mr. Cooper: I ask your Honor to go ahead.

A. (Continuing). *So, when you bring the other five around the guy is going to be there and I'll drop it off the house later. I'll give you the whole fifteen hundred, whatever it is* is said by Dono.

All right is said by Bonaguro.

All right, okay is said by Bonaguro.

Take care, John is said by Bonaguro.

Yeah is said by Dono and *I'll see you later* is said by Dono, I believe.

Mr. Quinn: Your Honor, I respectfully request that Government's Exhibit 8 be exhibited to the jury.

The Court: Yes, pass it around.

(Whereupon, Government's Exhibit 8 in evidence was passed among the jurors.)"

Four days later, on August 6, 1968 Bonaguro was arrested by Hurley.

This constitutes the entire case against Bonaguro on all four counts.

We turn now to the question whether the evidence of the phone conversation was sufficient in law to prove guilt of any of the counts beyond a reasonable doubt assuming, *arguendo*, that Bonaguro was in fact the party to whom Dono spoke.

(a) *The Internal Content of the Conversation.*

The internal content of the conversation is not of itself indicative of any illicit pre-existing conspiracy between Bonaguro and Dono to traffic in counterfeit money. The word "counterfeit," or some slang expression of similar import, was not used by the parties to the conversation. No reference of any kind is made to Digiamo or Cubeiro.

The subject matter of the conversation is almost totally obscure and appears to refer only to a monetary transaction involving a quantity of "five" otherwise unspecified items, an unnamed brother of Dono and a fourth person not identified at all.

The inscrutable outlines of the dialogue thus offered to the jury rendered it inherently sterile for probative purposes within the concept of proof beyond a reasonable doubt. On its face, the conversation is susceptible via ordinary experience of a great many legitimate meanings. Any interpretation of an illicit content would be more the product of suspicion than proof.

(b) *The External Factors.*

The prosecutor apparently recognized—as, indeed, he could hardly avoid—the fragile aspects of the case against Bonaguro. For this reason he sought to engraft upon the recorded conversation a frame of reference which would appear to include some of the other evidence in the case.

Thus, he argued, in summation that since $750 was the price agreed by Cubeiro to be paid for the $5,000 of counterfeit money, Dono's reference to $1,500 could only mean the price of two deliveries of $5,000 in counterfeit money. Admittedly, however, no second delivery occurred because, as

the prosecutor further surmised, Bonaguro must have been tipped off.

This inference as to the $1,500, of course, is dependent in turn upon the validity of another underlying inference to be drawn, *viz.*, that the reference to "five" exclusively meant $5,000 in counterfeit money. This imaginative assumption, however, has no basis other than speculation arising from the evidence that the transaction between Cubeiro and Dono involved $5,000. Yet, nothing in the evidence itself connected the two numbers. Accordingly, the prosecution asked the jury to indulge in this speculation. Denominating it a reasonable inference, he urged the jury (2693):

> "Five thousand dollars is in this case, and you did hear the telephone conversation, and again I ask you to draw reasonable inferences from that as to what they were talking about."

The prosecutor also sought to make conjectural capital out of the following portion of the conversation:

> "Did you give that to my brother last night?" (ascribed to the voice of Dono)
>
> "Yeah." (ascribed to the voice of Bonaguro)

These lines, it was postulated could relate to Dono's post-arrest admission that he obtained the counterfeit money from his brother Fred at Fred's gas station (2450). Therefore, the prosecutor argued, when Bonaguro affirmed that he gave "that" to Dono's brother the night before, the word "that" had reference to the same $5,000 in counterfeit money obtained by Dono (according to Hurley's testimony)

from his brother. The name of Dono's brother is not mentioned in the recorded conversation.

Once again, there is nothing in the evidence upon which to infer that Dono's question referred to the money which Hurley said Dono admitted getting from his brother. Moreover, Dono's alleged admission is not evidence against Bonaguro, having been made after Dono's arrest.

In the final analysis, the recorded conversation is by its own terms too ambiguous to allow it to stand as the sole predicate of the multi-count convictions below. Nor does the conversation attain enriched meaning by speculating as to its precise interpretation in the light of external facts in the record whose only bearing upon the conversation derives from tenuous inferences.

In so stating we are not unmindful of the oft-cited rule that a jury verdict will be sustained if that view of the evidence most favorable to the Government supports the verdict (*Ingram* v. *U. S.*, 360 U.S. 672, 79 S. Ct. 1314). The evidence in support of the verdict, however, must be "substantial" (*Glasser* v. *U. S.*, 315 U.S. 60, 80, 62 S. Ct. 457, 469).

We, therefore, respectfully urge that the evidence adduced against appellant Bonaguro lacked the required substance to authorize a jury to find him guilty beyond a reasonable doubt as to the conspiracy count or any of the substantive counts.

In so stating, we also respectfully draw the Court's attention to the language of the unanimous Court in *Direct Sales Co.* v. *United States*, 319 U.S. at p. 711, 63 S. Ct. at p. 1269:

"* * * charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning * * * a dragnet to draw in all substantive crimes."

POINT TWO

The Court's allowance of testimony as to the finding of $1,978 in genuine currency in Bonaguro's wallet at the time of his arrest was prejudicial error.

On August 6, 1968, four days after Dono's arrest, Agent Hurley arrested Bonaguro at the Caton Scrap Metal Company in Staten Island (1949-1950). Bonaguro was the President of that company.

At the time of the arrest, Bonaguro was searched. There was found in his wallet the sum of $1,978 in currency. The money was concededly genuine and so stipulated.

The Court's allowing of testimony as to the finding of that money, however, was objected to by counsel for Bonaguro upon the ground that such testimony would improperly allow the jury to infer that Bonaguro was involved in counterfeiting, and received that money from the proceeds thereof. Further objection was made that the $1,978 was not part of the res gestae.

The objection was overruled by the trial Court. The Court stated:

"The Court: It might indicate they (Dono and Bonaguro) are part of a conspiracy and they transferred it with reference to something else, some other bad currency."

No other evidence was introduced by the Government to show the source of the genuine currency or how it was acquired by Bonaguro or to otherwise connect the money to the counterfeiting transaction among Cubeiro, Dono and Digiamo.

It is respectfully urged that the trial Court erred in allowing the testimony as to finding $1,978 on Bonaguro's person when he was arrested four days after the alleged counterfeit transaction among Cubeiro, Dono and Digiamo. Such testimony was irrelevant and prejudicial.

There was nothing in the evidence to indicate any reasonably probative relationship between the counterfeit money and the money found on Bonaguro. Certainly, it would not be unusual for a businessman engaged in scrap metal transactions to have such a sum of money while at his place of business.

The testimony as to the money found on Bonaguro could serve only one purpose in the case—to furnish an improper and prejudicial basis for the jury to speculate that a man with that large a sum of money in cash on his person might be involved in an illicit enterprise. Since the only illicit enterprise in sight was counterfeiting, the jury was thereby invited to conjecture that the $1,978 was connected to the charge of counterfeiting against Bonaguro by way of being proceeds thereof.

Had there been other evidence that Bonaguro's possession of the $1,978 was an abnormal event (i.e. a sudden inexplicable acquisition of a large amount of money), there might conceivably have been a relevant basis for such testimony being allowed (*U. S.* v. *Jackson,* 102 F.2d 683, 2d Cir., 1939). Yet even in those instances "its probative value

may be outweighed by the possibility of confusing and prejudicing the jury." (*Lydia* v. *U. S.*, 321 F.2d 788, 790, 9 Cir., 1963).

At bar, where the only other evidence directly applicable to Bonaguro, was the cryptic telephone conversation, any improper or irrelevant evidence could easily have had the effect of unfairly swaying a jury against him where otherwise he might at least have been given the benefit of a reasonable doubt. Indeed, even if there were some relevancy to the factor of the $1,978, its inherently prejudicial effect in these circumstances far outweighed its dubious probative value. As Judge Learned Hand pointed out in *U. S.* v. *Costello,* 221 F.2d 668, 674 (2d Cir. 1964):

> "It is hornbook law that, although a party may offer evidence rationally relevant to the issue, that does not make it admissable. It may * * * tend rather to mislead than to enlighten the jury."

Thus, in either view of the admissibility of the evidence of the $1,978, the effect thereof in the particular factual setting of this case, could only have unfairly prejudiced appellant in his defense. The prejudice to a defendant is intensified when the relevancy of such evidence is either minimal or (as we contend) altogether non-existent. The Second Circuit, in *U. S.* v. *Birnbaum,* 337 F.2d 490, 497, said:

> "It would indeed deprive defendants of fair trials on the issues relevant to the specific charges against them if juries were allowed to draw unwarranted inferences from such unrelated, irrelevant matters. See *United States* v. *Beno,* 324 F.2d 582, 589 (2d Cir. 1963)."

We, therefore, submit that the receipt into evidence of the genuine currency in Bonaguro's possession at the time of his arrest four days later, was prejudicial error.

POINT THREE

The Court's supplemental instructions to the jury failed to resolve their expressed inability to comprehend the distinction between the concept of conspiracy and the concept of aiding and abetting under the substantive counts.

We commence our analysis of this Point by setting forth the guiding principle enunciated by the United States Supreme Court in *Bollenbach* v. *United States*, 326 U.S. 607, 612-613 (1945):

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."

The jury's difficulties arose initially during the main charge. While no exception to the main charge was taken as required by Rule 30 of the Federal Rules of Criminal Procedure, we believe the case falls within that class of cases treated as plain error which this Court may notice even in the absence of exception.

At all events, the continued confusion in the jury's mind, led, ultimately, to the making of a motion for a mistrial by all counsel, which motion was denied.

We review seriatim the events at issue on this point.

As indicated, the problem arose during the main charge. The Court, after instructing the jury on the principles of law applicable to aiders and abettors went on to define when a person could *not* be deemed an aider or abettor. This latter instruction was given in the form of single sentence of over 100 words as follows:

> "Of course, one may not be found guilty as an aider and abetter unless the principal has been found guilty of possessing or passing or attempting to sell, or all three, or any of them, and, in addition, one who aids and abets may not be found guilty even though the principal has been found guilty unless the jury finds beyond a reasonable doubt that the aider and abetter had the criminal intent and unlawfully and willfully and knowingly consented and participated in it to the extent of aiding and abetting the principal, and thereby contributed to the execution of that criminal act by the principal actor."

At this juncture, Juror Number Two interrupted the charge to request a repetition of "the last forty words" "Approximately".

The Court then re-read the last quoted paragraph of its main charge. In response to the Court's inquiry as to whether the re-reading clarified the matter, Juror Number Two asked the Court to go back "twenty words" referring to the "second part" of the re-read paragraph.

The Court thereupon attempted to explain this aspect of the law to Juror Number Two. Apparently this explanation satisfied Juror Number Two at that time, for he asked no further questions.

Juror Number Nine, however, was somewhat uncertain for he inquired as to whether the example posed in response to Juror Two's question whether an aider and abetter in the substantive crimes of passing or attempting to sell counterfeit money (as just defined in the illustration) might also be guilty of possession. The Court replied "No, I'm going to come to that".

The Court then continued its instructions for two pages with respect to the criminal responsibility of persons for the substantive crimes of others as determined by whether or not they were found to be members of the conspiracy. Juror Nine announced that the matter was now clear to him.

At this point, after a short recess, Juror Two again interrupted to state, "Your Honor, can I ask you a question?"

The Court did not reply to this but continued with its charge to the jury. There was no further interruption along these lines, and the Court sent the jury out at 3:45 P.M. to begin deliberating.

At 5:00 P.M., the jury returned and requested "a review of the definitions of A, a conspiracy; and B, of aiding and abetting". The Forelady advised the Court, "We seem to be confused by the difference between them.

(They also requested the transcript of the telephone conversation (Exhibit 8). This was supplied to them.

The Court thereupon had the reporter re-read the original charge as to aiding and abetting.

In response to the Court's inquiry as to whether that was what was desired, Juror Two stated he wished a re-

view of the charge as to conspiracy. The reporter then re-read the original charge as to conspiracy. Juror Two and the Forelady announced their satisfaction with the portions of the main charge as re-read to them.

The jury thereupon resumed their deliberation at 5:25 P.M. At 6:04 P.M. a recess for dinner was taken.

At 9:10 P.M. the jury returned to the Courtroom and the Court directed them to retire for the night at a hotel. At this point, the following ensued:

"Madam Forelady: Your Honor, I think that if we have one point cleared up we can settle this matter within ten minutes.

The Court: All right.

Madam Forelady: We need this point clarified.

The Court: You need something clarified?

Madam Forelady: Yes.

The Court: What is that?

Madam Forelady: We asked the reading between—we asked for the reading of the conspiracy, we asked for the reading of aiding and abetting. We seem to be confused on the difference between the two of them and that is what is holding us up.

The Court: I don't know how I could make it any clearer to you than—

Madam Forelady: May I ask a question then?

The Court: Yes.

Madam Forelady: In a conspiracy, as we understand it, does there have to be a prior understanding between two conspirators before the—

The Court: The conspiracy comes into existence?

Madam Forelady: Yes."

The Court then gave the jury still further instructions, concluding with the question, "Wasn't that clear?"

The following then ensued:

> "Madam Forelady: Yes.
>
> The Court: What isn't clear?
>
> Madam Forelady: What seems to be puzzling us is that if—does this agreement have to exist before everything occurs or when this thing occurs—"

The Court made a further attempt to instruct the jury. After a lengthy dissertation of the legal principles vis-a-vis the evidence adduced, the Forelady stated that it was now "clearer".

At this point, Juror Eight interjected, "There seems to be a fine line between conspiracy and aiding and abetting".

The Court, replying that "There is not a thin line, went on to instruct the jury further on the subject. Juror Eight stated the matter was now clear.

The Court nonetheless commented further on the distinctions between conspiracy and aiding and abetting, at the conclusion of which the following occurred.

> "Madam Forelady: Your Honor, the aiding and abetting, as you explained it, would seem to constitute—the way I have just interpreted it—that the fact that one person has helped another person to commit a certain crime—
>
> The Court: That's right, and with all of the intent and knowledge and the willfullness—
>
> Madam Forelady: With full knowledge and everything—

The Court: —and all of the other necessary elements that I have explained to you—

Madam Forelady: Yes.

Now, to take it out of the realm of aiding and abetting and put it into conspiracy—

The Court: You see,—

Madam Forelady: May I continue—

The Court: Conspiracy is a different crime.

Madam Forelady: It would have to be shown to us that there was a definite agreement before this was done, before the help was done.

The Court: No.

Madam Forelady: We are still confused."

The Court then offered further instructions and the Forelady acknowledged that it was now "clearer".

Following this, counsel for Digiamo requested the Court to define again the elements of the conspiracy and substantive charges, stating that he did not believe the jury had understood them. The prosecutor in turn suggested that the jury be polled on the matter.

The Court then inquired of the jurors whether they understood the elements of conspiracy, the substantive crimes, and the law of aiding and abetting. All the jurors except Juror Two stated it was clear to them.

With respect to Juror Two, the following thereupon occurred:

"The Court: Then number two apparently is the only one who says that it is not clear.

Is that correct?

Juror Number Two: I would rely upon my fellow jurors to explain. I would be glad to rely upon my

fellow jurors to explain it to me in the privacy of the jury room.

The Court: Well, you have already explained it—

Juror Number Two: I'm sure it would come back to me in a few moments, sir.

The Court: Do you want it explained again?

Juror Number Two: In fairness to the trial, I believe it would not be—it would be helpful.

May I interject a moment? I think probably if you gave me five words the whole thing would come back to me in a sequence.

The Court: I charged on all of this and then I asked you to retire, and that is always done to see if the lawyers have any objections to the charge. There were no objections to the charge and they found it perfectly satisfactory and therefore, out of an abundance of caution it is wiser to have the charge that was found satisfactory on any particular point read exactly as I gave it.

Will you find the—

Juror Number Two: I hope it won't be considered impertinent, sir, but it is a—sir, may I say something, please?

The Court: Yes.

Juror Number Two: It is apparent, the elements, the 'elements' in quotation marks it is a legal term. I think we would say—it is my feeling that if we could get to this in the charge and perhaps read me four or five sentences it would refresh to me what you are talking about.

I don't mean this in impertinence, I don't really feel that I would require an extensive reading to bring it to my mind.

The Court: I don't know what it is that you have not gotten and out of an abundance of caution I want to be sure that you have got it.

Juror Number Two: It is—"

The reporter then re-read, at the request of the Court, those portions of the Court's charge on the elements of the substantive crimes in counts five, six and seven.

In response to questions by the Court, the jurors stated that they understood the elements. In response to further questions by the Court, the jurors also indicated that they understood the elements of conspiracy and aiding and abetting. The jury then, at 9:45 P.M. resumed deliberating.

At this posture of the case, one might be tempted to assume that the jury now understood the Court's instructions. As will be seen, however, such was not in fact the situation.

Five minutes later, at 9:50 P.M., the jury announced that they had reached a verdict.

When the Court inquired how they found on count one, the conspiracy count, they stated they found each defendant guilty.

When the Court inquired how they found on count five, the passing count, the following transpired.

"The Court: How do you find as to count five as to the defendant John Dono?

Madam Forelady: Guilty.

The Court: And as to the defendant Mike Bonaguro? This is count five, the passing count?

Madam Forelady: We found him guilty.

The Court: And as to the defendant Frank Digiamo on this passing count?

Juror Number Eight: We are going to have to stop. We didn't go into this. We thought—

Madam Forelady: We thought, your Honor, that if a conspiracy existed that because one member was guilty it automatically made all the members equally guilty if a conspiracy existed.

The Court: But you still have to render your verdict on count five.

Madam Forelady: We did not go into the individual because we—

The Court: You will have to do that. I would think that we do have your verdict on the conspiracy count.

Madam Forelady: Yes."

The Court then directed the jury to retire for the night and resume deliberations the next morning in regard to the substantive counts.

After the jury left the Courtroom, the Court told counsel:

"The Court: About having found the conspiracy, what the law is on the substantive counts, this is what is now confusing them, I will have that read to them tomorrow morning.

Mr. Schofield: Can we also tell them at that time they can take back the conspiracy in light of now being—

The Court: No, no, no."

The following morning all counsel moved for a mistrial in view of the jury's patent lack of understanding of the charge with respect to "the nature of the elements of the

conspiracy as opposed to the elements of the substantive crimes". The motions were denied.

The Court thereupon instructed the jury further with respect to the effect of their finding of a conspiracy upon their verdict in regard to the substantive counts.

The jury returned shortly thereafter with verdicts of guilty as to all defendants on each substantive count. The elapsed time was twenty minutes.

Motions to set aside the verdicts were denied.

It is our position that with regard to appellant Bonaguro the evidence as to him was at best tenuous—if not entirely insufficient in law. The evidence consisted only of Dono's post-arrest telephone conversation. From that evidence alone the jury was authorized by the Court—if the jury believed it—to find Bonaguro guilty of the conspiracy and of the three substantive counts as well.

Indeed, the jury was invited by the prosecutor to draw multifarious inferences from that telephone conversation and then, by a form of relation back, connect them exclusively to the Cubeiro-Dono-Digiamo conspiracy. It must not be overlooked in this regard that there is no evidence whatever of any act or declaration by Bonaguro at any time during the period in which the conspiracy or substantive crimes occurred.

Thus, it was vital to the juror's consideration of Bonaguro's case that they be made to clearly understand the distinctions between conspiracy and aiding and abetting.

These distinctions, and the differing legal consequences which flowed from each were particularly crucial in Bonaguro's case because the evidence adduced was such that

if the jury were to find that Bonaguro was not a member of a conspiracy then, as a matter of law, there was no basis in the evidence upon which they could have found him to have been an aider or abettor in any of the substantive counts.

Nevertheless, the jury, in their repeatedly avowed inability to comprehend the applicable law, could well have wound up—in their confusion—by concluding, for example, that Bonaguro was a conspirator on the paradoxical theory that he was an aider and abettor.

As late as the point at which the jurors first returned with an incomplete verdict, it was self-evident that they were deliberating in an atmosphere of bewilderment.

In such circumstances, the motions for a mistrial should have been granted, and the verdict set aside.

As stated in *Powell* v. *United States*, 347 F.2d 156, 158 (9 Cir., 1965):

> "It is no answer to say that the supplemental instruction was correct, so far as it went; or that it was to be read in the light of the original instructions and that these fairly presented the issues. The ultimate question is 'whether the charge taken as a whole was such as to confuse or leave an erroneous impression in the minds of the jurors.' Perez v. United States, 297 F.2d 12, 16 (5th Cir. 1961)."

See, also, *U. S. v. Harris*, 388 F.2d 373 (7 Cir., 1967); *Bland* v. *U. S.*, 299 F.2d 105 (5 Cir. 1962).

CONCLUSION

The petition should be granted and this Court, in the exercise of its powers, should order that the judgment of conviction be reversed and the indictment dismissed.

Respectfully submitted,

EVSEROFF, NEWMAN & SONENSHINE
Attorneys for Petitioner

WILLIAM SONENSHINE, Esq.
Of Counsel

APPENDIX A

Opinion of the United States Court of Appeals Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 575, 576—September Term, 1969.

(Argued March 5, 1970 Decided June 15, 1970.)

Docket Nos. 34244, 34378

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

JOHN DONO and MICHAEL BONAGURO,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge,*
ANDERSON, *Circuit Judge,* and DOOLING, *District Judge.**

Appeals from convictions, after trial in the Eastern District of New York before the Honorable Joseph C. Zavatt, *Ch. J.*, and a jury, of passing counterfeit Federal Reserve Notes, of attempting to sell such counterfeit notes, of possessing such notes with intent to defraud, and of conspiring to commit such offenses.

Affirmed.

* Of the Eastern District of New York, sitting by designation.

JOSEPH J. PETITO, Esq., *for Defendant-Appellant John Dono.*

WILLIAM SONENSHINE, Esq. (Messrs. Evseroff, Newman & Sonenshine, of Counsel), *for Defendant-Appellant Michael Bonaguro.*

MICHAEL CARNES, Esq., Attorney, Department of Justice (Edward R. Neaher, Esq., United States Attorney, and David Quinn, Esq., Special Attorney, of Counsel), *for the United States.*

DOOLING, *District Judge*:

The indictment, in seven counts, charged John Dono, Fred Dono, Michael Bonaguro and Frank Digiamo with passing, attempting to sell and fraudulently possessing on July 19, 1968, two hundred and fifty counterfeit twenty dollar Federal Reserve Notes (Counts Two, Three and Four), with passing, attempting to sell and fraudulently possessing another two hundred and fifty counterfeit Federal Reserve Notes on August 2, 1968 (Counts Five, Six and Seven), and with conspiring to possess and conceal, and to pass, utter, publish, and sell counterfeit twenty dollar Federal Reserve Notes. The outline of the offense, as the Government had evidently planned to prove it, was that Michael Bonaguro was a source of the counterfeit bills, that he passed them to John and Fred Dono, that they in turn passed them to or through Frank Digiamo to Emilio and Meliton Cubeiro, and that the Cubeiros passed the bills. Apparently because of the unwillingness of Emilio Cubeiro to testify little evidence relevant to the July 19, 1968, transaction was available and the court dismissed

Counts Two, Three and Four at the close of the Government's case. The case as to the four remaining counts, on which the appealing defendants were both convicted, came principally from the testimony of Meliton Cubeiro and that of the Secret Service agents who, having arrested Meliton Cubeiro on July 31st when he was attempting to pass $1,400 in counterfeit Federal Reserve Notes to a Secret Service agent, undertook to carry through under Government surveillance a further "buy" of counterfeit from his suppliers.

The evidence warranted the jury in drawing the following conclusions about the facts:

Michael Bonaguro was engaged in business as Caton Scrap Metal Corporation, of which he was president, on Staten Island. John and Fred Dono were engaged in the operation of a gasoline station in Brooklyn, and John Dono lived with his family on Staten Island near Frank Digiamo. Frank Digiamo had long known Emilio Cubeiro, and Emilio and Meliton Cubeiro also lived on Staten Island a few blocks from where John Dono and Frank Digiamo lived. Some time before July 29, 1968, Emilio Cubeiro had obtained for $750 from a source apparently not known to Meliton Cubeiro five thousand dollars of counterfeit twenty dollar Federal Reserve Notes, and Emilio and Meliton Cubeiro each took twenty-five hundred dollars of the counterfeit notes. Before July 29th Meliton Cubeiro had disposed of his $2500 in counterfeit notes and had taken over from his brother Emilio a further $1400 of the notes. While he was attempting to sell these last notes to a Secret Service agent on the evening of July 31, 1968, Meliton Cubeiro was arrested, and undertook to "cooperate" with the Secret Service.

Before his arrest, on July 29, 1968, Meliton Cubeiro had met his brother Emilio with Frank Digiamo at his brother's house. Meliton and Emilio Cubeiro had earlier that day talked to one another about getting more counterfeit money, and Meliton raised with Digiamo and Emilio the matter of Digiamo's seeing whether he could get another $5,000 of counterfeit notes for Meliton Cubeiro. But Meliton Cubeiro was arrested on July 31st and he brought about his brother's arrest on the same night. The two were evidently to cooperate with the Secret Service; both were released without bail by the Commissioner the night of their arrest, and they returned home with the understanding that they would attempt to follow through on the purchase of the further $5,000 of counterfeit money under surveillance.

On the next evening, August 1, 1968, Meliton and Emilio Cubeiro met Frank Digiamo at Meliton Cubeiro's house around seven or seven thirty in the evening and talked. Meliton asked about the additional $5,000 of counterfeit money that he had spoken of two days earlier.

The earlier purchase of $5,000 worth of counterfeit had been managed by Emilio, and Meliton Cubeiro did not know from whom Emilio had bought the counterfeit; Meliton now pressed Frank Digiamo to introduce him directly to the supplier. The three men then drove to the house of John Dono in Frank Digiamo's car, and, after waiting about for Dono to appear, finally the three approached Dono in the driveway of his house and Frank Digiamo introduced Meliton Cubeiro to Dono as Emilio's brother. Meliton asked John Dono about getting $5,000 in counterfeit twenties, and Dono said he would order them for Cubeiro for $750 and would let him know when he could have them. Something was said about a cheaper price later on, and Dono said that he would let Meliton Cubeiro know if he could get them any

cheaper on the next buy. Cubeiro told Dono that he already had the $5,000 that he was ordering sold and wanted to buy another $5,000 right after that. No date for such a future delivery was then fixed.

The next morning Meliton Cubeiro ran into Frank Digiamo, and Digiamo told Meliton that John Dono had the money at his house, that he was leaving for work and that Meliton should go there and pick the money up. At that point Meliton returned to his house and telephoned the Secret Service. He waited until a Secret Service man came for him in a car. The two drove in the Agent's car to John Dono's house. The Agent searched Cubeiro and made sure that he had no counterfeit currency on him; Cubeiro was not supplied with any government money to pay for the counterfeit. Cubeiro then went up John Dono's driveway alone to the back door of Dono's house, knocked, was admitted, and was handed an envelope by John Dono which he saw at a glance contained money. Dono suggested that Cubeiro count the money, but he declined to do so. He said that the money was out in his automobile and that he would take the counterfeit and go and get the money. Dono acquiesced, and Cubeiro went out to the car and showed the money to the agent. Other agents were present in other vehicles; they converged on the house, satisfied themselves that the money was indeed counterfeit, and promptly placed Cubeiro and Dono under arrest.

John Dono was taken to 90 Church Street and when he was searched there was found in his wallet a business card of Caton Scrap Metal Corp., Michael Bonaguro, President, with an address in Staten Island and a telephone number. John Dono agreed to make a telephone call to the number indicated on the business card, and the Agents recorded the ensuing conversation while one Agent listened to the con-

versation on an extension with John Dono's assent. The Agent testified that while he had never heard Michael Bonaguro's voice before either in face to face conversation or over the telephone, he became acquainted with his voice in consequence of arresting Bonaguro later and of hearing him talk at his arraignment and on another occasion. The telephone conversation, as it appears from the record and appellants' brief started with a sufficient exchange to indicate that it was a conversation between someone called Mike and another one called John. Assuming that the two were John Dono and Michael Bonaguro, the conversation went on as follows:

Dono: Did you give that to my brother last night?

Bonaguro: Yeah.

Dono: Yeah. Did he tell you that the guy wanted another five or what?

Bonaguro: Yeah. I couldn't get in touch with him; I called him from the, you know, station . . .

Dono: Yeah?

Bonaguro: He wasn't there though, you know, so I called him this morning; I mean, I forgot to call him this morning . . .

Dono: Yeah?

Bonaguro: So I didn't know. Well he's supposed to call me at three thirty.

Dono: Alright.

Bonaguro: Alright John.

Dono: Yeah.

Bonaguro: Yeah. I'll be able to get him [them?] for you and bring him [them?] over to you tonight.

Dono: OK.

Bonaguro: Alright, John.

Dono: So long.

Bonaguro: Oh, listen!

Dono: Yeah?

Bonaguro: If he asks me about the . . . You didn't give him the money, did you?

Dono: No, I didn't give him no money.

Bonaguro: Yes, the guy is . . . He wanted another five, right?

Dono: Yeah. So when you bring the other five around the guy is going to be there and I'll drop it off at the house later. I'll give you the whole fifteen hundred, whatever it is.

Bonaguro: Alright, OK. Take care, John.

Dono: Yeah, I'll see you later.

No immediate action was taken against Bonaguro. However, on August 6th he was arrested at his place of business. He had on him other business cards that were the counterparts of the business card found in the wallet of John Dono, and he had on his person $1,978 in currency.

Such were the facts that the jury could find if it accepted the Government's evidence as true and rejected the defendants' evidence.

1. The question of the admissibility of the evidence that the defendant had on him $1,978 in currency became confused in a question over whether there had been an order suppressing evidence of the discovery, and then in a further confusion over whether the evidence of it should be "suppressed" at the trial. But the Court was made aware, though hardly plainly aware, that the admissibility of the evidence of the discovery of the money on Bonaguro was objected to on the grounds that it was neither inferable that it had been derived from any specific counterfeit transaction relevant to the case, nor could it be viewed as evidence that the defendant Bonaguro was in the business generally of selling counterfeit currency for genuine currency. Both Bonaguro and Dono joined in the objection.

The currency could have included money derived from the transaction involved in the three substantive counts, only if Digiamo or Dono paid Bonaguro against delivery, and that would not account for more than $750, or, at most for $1,500, if it be assumed that there had been an earlier transaction of exactly the same sort giving rise to the Cubeiros' earlier sales of counterfeit. Possession of the currency was at best evidence that Bonaguro was engaged in other such sales with or through Digiamo or Dono if, but only if, the jury so inferred and connected it with the conspiracy count. However, Bonaguro tried to prove that the currency represented the proceeds of a specific scrap metal transaction, and in the effort he aroused more suspicion than he allayed. The explanation—not given by Bonaguro, who did testify—was that Bonaguro had sold scrap to another company for $3,700 on August 2d, four days before the arrest, and that a check was issued by the buyer to cover the sale which was payable to Viscardi, a young truckdriver who was, ordinarily, a casual employee

of a corporation that shared the same offices with Bonaguro's company. Viscardi testified that when he got the check he immediately turned it back to the issuer for cash and turned the cash over to Bonaguro.

Whether or not evidence about the currency should have been admitted is primarily a question of balancing relevancy against unwarranted prejudice, a question on which a proper deference to the trial judge's sense of the trial atmosphere is peculiarly appropriate. *United States v. Craft*, 6th Cir. 1969, 407 F.2d 1065, 1070; cf. *United States v. Jackskion*, 2nd Cir. 1939, 102 F.2d 683, 684. See McCormick, Evidence, 1954, 318-319. Irrelevancy is as apparent to jurors as it is to jurists. If possessing the currency was not persuasive of complicity in the charged counterfeiting conspiracy, then the evidence was hardly damaging. The evidence Bonaguro called to suppress the inference he evidently feared may have suggested to the jury that the use of cash was not usual to the scrap metal trade, and they may well have inferred a consciousness of a guilty connection of the cash with the counterfeit dealings from the inadequacy of the evidence produced as compared with such simpler proofs as bank deposit records. There is no reason to suppose that the jury viewed the currency matter in anything other than a healthy and worldly-wise perspective.

2. The Court cut off cross-examination of Cubeiro about his sales of counterfeit on Fifth Amendment grounds, and Dono complains of this.

Dono's defense did not turn on that point. Dono was not himself a witness. He presented evidence that Meliton Cubeiro, when he got out of the Secret Service Agent's car at Dono's house and walked up the driveway, stooped

down and picked up an envelope from the bushes that grew alongside the driveway on an adjacent vacant lot, and carried that envelope into John Dono's house where, there was testimony, John Dono was heard to reject some proposal made to him by Cubeiro. The defense, in a word, was that Cubeiro was not a buyer from John Dono but an attempted seller of counterfeit currency to John Dono. Dono's cross-examination of Cubeiro about his earlier passing of counterfeit currency might have brought out further that Cubeiro had procured that currency from his brother Emilio and, inferentially, not necessarily from John Dono. Further questioning might have tended further to damage Cubeiro's credibility as a witness.

In the total circumstances of the case the cutting off of cross-examination was not prejudicial, and did not so deprive the defendant of his rights of cross-examination as to warrant striking the testimony of Cubeiro. The witness had in other parts of his testimony fully portrayed himself as a passer of counterfeit; he testified to having disposed of at least $2500 of counterfeit money and to having been arrested in the process of trying to sell $1400 of counterfeit notes. In that setting the prevention of further testimony on the self-incrimination ground did not in fact exclude the significant matter that it was the purpose of the cross-examination to emphasize. See *United States* v. *Cardillo*, 2d Cir. 1963, 316 F.2d 606, 610-614.

3. Dono contends, first, that the counterfeit money should have been suppressed as illegally obtained because it was obtained by having Cubeiro, the Government's "agent," enter Dono's home in the guise of a buyer and pretend to buy the counterfeit money. But there was neither a search nor a seizure. Dono willingly entered into the transaction

meaning it to be what it was, an illegal sale of counterfeit notes to a willing buyer. That the buyer meant to betray Dono to the Secret Service agents did not alter the consensual nature of the transaction.

Dono argues, next, that it was error not to charge entrapment. The evidence was, however, that the transaction of August 2 had been initiated by Meliton Cubeiro with Digiamo on July 29, before Cubeiro's arrest and his undertaking to cooperate. The Government but took advantage of an on-going course of criminal dealing to obtain specific evidence; it was not the author of the crime, nor did it instigate its commission; rather, it afforded an opportunity for the continuation of an established course of criminal conduct. *Lopez* v. *United States*, 1963, 373 U.S. 427; *United States* v. *Henry*, 2d Cir. 1969, 417 F.2d 267, 270.

Dono's final contention that the "*Miranda* warning" (*Miranda* v. *Arizona*, 1966, 384 U.S. 436, 478-479) was inadequate, especially in view of his diabetic condition, is wholly without support in the evidence. The warning was complete and careful, and the defendant, very evidently, was, originally, altogether willing to cooperate in the effort to broaden the investigation.

4. Bonaguro contends that the jury's persistent interrogation of the Court about the distinction between guilt of conspiracy and guilt as one of several persons aiding and abetting one another in the commission of a crime, coupled with the manner in which the verdict was first returned, indicate in combination that the jury did not comprehend the Court's charge. It is not argued, nor does it appear that the Court erred in its charge or supplemental charge.

Far from indicating incomprehension, the jury's questioning of the Court manifested a conscientious pursuit

of an elusive but at times important distinction (cf. *Pinkerton* v. *United States*, 1946, 328 U.S. 640, 646-647; *United States* v. *Guidice*, 2d Cir. 1970, Slip Opinion p. 2563 at pp. 2571-2573); the interrogation did credit to the jury, and the Court's determination to satisfy the jury's inquiry was exemplary and successful.

When the jury, returning a verdict on the conspiracy count, declared itself unready to give a verdict on the substantive counts because it "thought . . . that if a conspiracy existed that because one member was guilty it automatically made all the *members* equally guilty if a conspiracy existed" (emphasis supplied), it intuitively located a genuine area of overlap between Sections 2 and 371 of Title 18, and underrated the force of the charge that conspiracy is of itself a distinct offense even when the elements establishing culpable membership in the conspiracy and shared guilt of the conspiracy offense are also indispensable and sufficient to the proof of the substantive offense, particularly in its Section 2 aspect.

5. The sufficiency of the evidence to convict Bonaguro presents the most substantial of the questions raised on the appeals. When the government rested at the close of the whole case, Bonaguro's counsel agreed that Count Six could properly be submitted to the jury (Tr. 2522), and that count charged that the defendants with intent to defraud attempted to sell 250 counterfeit Federal Reserve Notes knowing that they were counterfeit.

The validity of the verdict depends ultimately on the weight which the jury could rationally accord to the overheard telephone conversation between John Dono and the defendant Bonaguro. The telephone conversation, if it stood alone, would be so cryptic that it could not be argued successfully that it would support a conviction. But the con-

versation did not exist in isolation from the events that had gone before, and the jury heard it aware of what had gone before, according to the Government's evidence, and equipped to translate its shorthand into understandable language. If the jury accepted the Government's evidence in its principal parts, it understood that some time before $5,000 in counterfeit purchased for $750 had come to the hands of Emilio Cubeiro through Digiamo and beyond him from John Dono, and that on the evening preceding the telephone conversation, Meliton Cubeiro, in the presence of his brother Emilio and Digiamo, had ordered another $5,000 of the counterfeit from Dono for the price of $750 and had raised the question of a still further $5,000. The jury knew too that John Dono and his brother Frank worked together in the Dono Brothers gas station on Flatlands Avenue in Brooklyn. Against that background the telephone conversation drops into place as neatly as the last piece that completes the picture in a difficult Chinese-puzzle. Bonaguro tells Dono that he had given the money to Frank Dono on the preceding night and that Frank Dono had passed on to him the word that the buyer who had ordered the $5,000 wanted a further $5,000; that Bonaguro had then tried to telephone his supplier from the gas station but could not reach him and was supposed to but forgot to call the supplier on the following morning; that he, Bonaguro, did not expect to hear from his supplier until later on the day of the telephone talk; Bonaguro then said that he would be able to get the supplier for John Dono and bring him over to Staten Island that night, but, before breaking off the conversation, Bonaguro wanted to know from Dono whether he had already passed the money along, since the supplier might ask Bonaguro that question. Dono answered—mendaciously, of course—that he had not

passed the money. Bonaguro then put in—as if to make the point perfectly clear so that he could repeat it to the supplier—that the buyer wanted another $5,000; to this Dono answered in the affirmative, and then said that when the still further $5,000 was brought around and the buyer was there he would drop it off at the house later on and give Bonaguro the whole $1,500 or whatever it was.

Despite the initial uncertainty as to exactly how the very last part of the conversation parsed and should be distributed between Bonaguro and Dono, the meaning of the whole is inescapably clear if the jury accepted, as it was free to accept, the Government's evidence in its principal emphases and the Secret Service Agent's identification of Bonaguro as the speaker. The last point, identification of Bonaguro as the speaker, was not wholly dependent on voice-recognition: the Secret Service Agents supervised the placing of the telephone call to Michael Bonaguro's place of business and his telephone number as given on his business card, and, in the conversation that followed, the person called identified himself as "Mike."

So viewing the telephone conversation in the total setting of the case, the jury could readily find beyond a reasonable doubt that Bonaguro's role was central and important in the conspiracy and in the substantive offenses. Very little is left to inference and nothing to conjecture once the meaning of the highly referential words used in the short telephone conversation is read out from the background of the speakers and the call as it was known to the jurors.

The judgments of conviction are, accordingly affirmed.

APPENDIX B

UNITED STATES CODE TITLE 18 §371

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

UNITED STATES CODE TITLE 18 §472

§472. Uttering counterfeit obligations or securities

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both. June 25, 1948, c. 645, 62 Stat. 705.

SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 390

MICHAEL BONAGURO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a seven-count indictment returned in the United States District Court for the Eastern District of New York, petitioner and others were charged with passing $20 counterfeit Federal Reserve Notes, attempting to sell them, possessing them with intent to defraud, and conspiring to commit such offenses in violation of 18 U.S.C. 472 (R. 1). After a jury trial, petitioner and two others were found guilty on Count 1 (conspiracy), Count 5 (passing), Count 6 (attempting to sell),

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and Count 7 (possession).[1] On June 23, 1969, petitioner was sentenced to imprisonment for a period of five years on each count, the terms to run concurrently. On appeal, the conviction was affirmed (Pet. App. A).

Petitioner argues here, as he did below, that his conviction should be set aside because (1) the evidence was not sufficient to support his conviction on both the conspiracy and substantive counts (Pet. 5–13), (2) the admission of testimony concerning $1,978 in genuine currency which petitioner had in his wallet at the time of his arrest was prejudicial error (Pet. 13–16) and (3) the jurors were permitted to return their verdict without an adequate understanding of the distinction between guilt of conspiracy and guilt of aiding and abetting another in the commission of crimes charged in the substantive counts (Pet. 16–26). Each of these arguments was carefully considered and properly rejected by the court of appeals in a comprehensive opinion on which we rely here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

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[1] Counts Two, Three and Four, relating to a separate transaction allegedly taking place on July 19, 1968, were dismissed by the trial court at the close of the government's case.